

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO COA2025CV00034**

**APPLICATION NO COA2025APP00088**

<b>BETWEEN</b>	<b>COAST TO COAST QUARRIES LIMITED</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>AND</b>	<b>COAST TO COAST CONCRETE COMPANY LIMITED</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>AND</b>	<b>IDEAL S AND J TRUCKING SERVICES COMPANY LIMITED</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>AND</b>	<b>CALISTON GRAHAM</b>	<b>RESPONDENT</b>

**Miss Stephanie Williams instructed by Henlin Gibson Henlin for the appellants**

**Hugh Wildman and Shemar Bryan instructed by Hugh Wildman and Co for the respondent**

**Miss Christina Thompson instructed by Braham Legal for Clifton Johnson and Shelly-Ann Simpson (the appellants in Supreme Court Civil Appeal No COA2025CV00033)**

**2, 3 and 4 September 2025**

**Civil procedure – Application for stay of execution – Oppression claim by company director and shareholder pursuant to section 213 of the Companies Act – Orders for forensic audit of companies as remedy for oppression – Whether requirements for a stay of execution satisfied**

**ORAL JUDGMENT**

**IN CHAMBERS**

## **MCDONALD-BISHOP P**

[1] This is an application by the 1<sup>st</sup> and 2<sup>nd</sup> appellants, Coast to Coast Quarries Limited ('Quarries') and Coast to Coast Concrete Company Limited ('Concrete') (together 'the applicants'), seeking orders that-

- (i) this appeal (Supreme Court Civil Appeal No COA2025CV00034) be consolidated with Supreme Court Civil Appeal No COA2025CV00033;
- (ii) orders 6 – 12 and 21 contained in the judgment of Jackson-Haisley J ('the learned judge') given on 26 March 2025, by which the learned judge ordered that there be a forensic audit of Quarries and Concrete, be stayed pending the determination of this appeal; and
- (iii) costs of the application be costs of the appeal.

### **The application for consolidation**

[2] In relation to the application for consolidation, the court notes the indication by Miss Christina Thompson, counsel appearing for Clifton Johnson and Shelly-Ann Simpson (the appellants in Supreme Court Civil Appeal No COA2025CV00033), that those parties support the application notwithstanding their failure to file any documents indicating their position. Mr Hugh Wildman, counsel appearing for the respondent, Mr Caliston Graham, indicated that Mr Graham does not oppose the application for consolidation.

[3] In any event, having considered the notices of appeal in both appeals against the background of the learned judge's judgment, and the respective support and non-objection to the application by the parties, I am of the view that this is an appropriate case in which to consolidate the appeals. Both appeals emanate from the learned judge's judgment and are brought by and against parties to the proceedings in the court below. The proceedings below concerned a claim for unfair prejudice brought by Mr Graham, pursuant to section 213A of the Companies Act, against the applicants, the 3<sup>rd</sup> appellant, Ideal S and J Trucking Services Company Limited, Mr Johnson and Ms Simpson. The

learned judge gave judgment in Mr Graham's favour and ordered, as one of the remedies for unfair prejudice, that there be a forensic audit of the applicants, and that the applicants pay to Mr Graham any sums due to him after being notified of the findings of the audit.

[4] The central issue raised in both appeals is whether the learned judge erred in ordering a forensic audit as a remedy for unfair prejudice, given the circumstances of the case. To that end, both appeals also challenge the various findings of fact and law made by the learned judge which underpin those orders. In the circumstances, it is in the interest of the overriding objective that the appeals proceed in accordance with the Court of Appeal Rules 2002 and be heard together as a consolidated appeal, to enable the court to resolve the issues raised by the parties and to avoid the risk of inconsistent judgments from the Court of Appeal flowing from the learned judge's decision.

### **The application for a stay of execution**

[5] In relation to the application for a stay of execution pending the determination of the appeal, I am guided by the usual principles applied by this court to determine whether to exercise my discretion to grant such an order. The overarching and fundamental question for the court in assessing the application is whether, in these circumstances, granting a stay best accords with the interests of justice (see **Combi (Singapore) Pte Ltd v Ramnath Sriram and another** [1997] EWCA 2164 ('**Combi**').

[6] The case law requires the court to consider two subsidiary questions in order to determine whether granting a stay best accords with the interests of justice: (i) whether the underlying appeal has some merit; and (ii) whether the grant of a stay is the order that is likely to produce less injustice between the parties (see **Combi, Hammond Suddard Solicitors v Argichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 ('**Channus Block**') at para. [10]). These questions are now considered.

#### **A. The merits of the appeal**

[7] In evaluating the merits of the appeal, the authorities are clear that, at this stage, I am not required to make detailed findings on the strength of the grounds of appeal (see, for example, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 at para. [30]). Instead, I must be satisfied that there is an arguable appeal with some merit or, stated differently, that the appeal is not “completely unarguable” or “wholly unmeritorious or wholly unlikely to succeed” (see **Watersports Enterprises Ltd v Jamaica Grande Ltd and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, judgment delivered 4 February 2009, at para. 8, **Calvin Green v Wynlee Trading Ltd and others** [2010] JMCA App 3 at para. [15] and **Reliant Enterprise Communications Limited and another v Infochannel Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal 99/2009, Application Nos 144/2009 and 181/2009, judgment delivered 2 December 2003). The need for caution in evaluating the merits of the appeal is particularly heightened in this case, where the application for a stay was filed with urgency early in the procedural lifespan of the appeal, and the record of the proceedings (including the notes of evidence taken) from the Supreme Court has not yet been filed.

[8] I also bear in mind that the appeal is centred upon a challenge to a remedy deemed appropriate by the learned judge on a successful claim for unfair prejudice pursuant to section 213A of the Companies Act. In **Ming Siu Hung and other v J F Ming Inc and another** [2021] UKPC 1, the Privy Council, in an appeal to the Privy Council from the Court of Appeal of the Eastern Caribbean Supreme Court in the British Virgin Islands, explained the applicable standard of review in an appeal against a trial judge’s determination of the appropriate remedies under section 184I of the BVI Business Companies Act 2004 (which is equivalent, although differently worded, to section 231A of the Companies Act). The Privy Council explained that because a trial judge has wide discretion to determine the appropriate type of order to be made as a remedy for unfair prejudice, an appeal against such a remedy engages the well-established principles of appellate restraint when dealing with a lower court’s exercise of discretion. This means that an appellate court should not disturb a trial judge’s decision on the appropriate

remedy for unfair prejudice unless satisfied that the remedy fell outside the reasonable range within which the judge's statutory discretion had to be exercised or was based on wrong principles of law (paras. 10 and 20 – 23).

[9] Despite the differences in wording between section 213A of the Companies Act and section 184I of the BVI Business Companies Act, I am satisfied that the same standard of review explained by the Privy Council in **Ming Siu Hung** applies in this jurisdiction, given the broad discretionary powers invested in the court by section 213A to determine the appropriate remedy for unfair prejudice. Therefore, the arguability of the appeal must be considered through this lens.

[10] Counsel for the applicants, Miss Stephanie Williams, advanced several grounds that she contended demonstrated the arguability of the appeal. It is not necessary for the purposes of this decision to outline all the respective grounds and arguments put forward on the applicants' behalf. It suffices to state that, having read the learned judge's judgment and considered the submissions of counsel on both sides within the framework of the applicable law and standard of review, I am satisfied that the appeal raises arguable grounds in relation to the appropriateness and proportionality of a forensic audit in this case, and that it cannot be said that the appeal is completely unarguable or wholly unmeritorious.

[11] Firstly, Miss Williams pointed out that that it was established in the expert evidence before the learned judge and in earlier related proceedings before Batts J, on which they rely, that a significant portion of the documents regarding the applicants' financial positions were not returned after a search order had been executed pursuant to an order obtained by Mr Graham (see para. [44] of the learned judge's judgment and the decision of Batts J in **Caliston Graham v Coast to Coast Quarries Limited** [2020] JMCC Comm 5 respectively). Miss Williams further submitted that there was no evidence before the learned judge that the documents were available and that they were in the same condition in which they had been taken. Mr Wildman submitted in response that the audit

would be expected to proceed based on the documents that the parties had in their respective possession.

[12] The availability of documents related to the applicants' financial positions would naturally raise questions about the feasibility, reliability and integrity of a forensic audit. However, the learned judge does not appear to have considered this issue when she expressed her reasons for determining that a forensic audit was appropriate in the case (see para. [234] of the learned judge's judgment). The absence of any reference by the judge to this issue raises an arguable question of whether she failed to take into account a relevant factor in exercising her discretion to order a forensic audit in the circumstances of this case.

[13] Secondly, the learned judge also ordered that the forensic audit cover the applicants' financial records from 2007 (in respect of Quarries) and 2009 (in respect of Concrete) to present. The forensic audits would therefore span 18 and 16 years, respectively. The applicants have also raised an arguable ground of appeal regarding the proportionality of such an order, in light of the long delay and any applicable statutory limitation periods for retaining company documents, which would render the audit report unreliable and practically inappropriate.

[14] Thirdly, and more globally, it is observed that although the discretionary nature of a judge's power to determine the appropriate remedy in a case of unfair prejudice has been settled by the Privy Council in **Ming Siu Hung**, there is a dearth of case law in this jurisdiction surrounding the appropriate circumstances in which a forensic audit should be ordered as a remedy for unfair prejudice. No case law or guiding principles were cited by the parties or referred to by the learned judge concerning the appropriateness of a forensic audit as a remedy for unfair prejudice. There is, therefore, a question worthy of investigation and ventilation on the appeal, regarding the appropriate circumstances in which a forensic audit should be ordered as a remedy for unfair prejudice under section 213A of the Companies Act and, in particular, whether one was appropriate in this case.

[15] For these reasons, it cannot be said that the appeal is completely unarguable or wholly unmeritorious.

[16] My view that there is an arguable appeal with some merit does not dispose of the application for a stay. In order to grant a stay, I must also be satisfied that a stay of execution is the order that is likely to produce less injustice between the parties.

B. The risk of injustice

[17] A primary consideration in this regard is whether the appeal will be rendered nugatory (see **Channus Block** at para. [10]). Also important is the fact that the purpose of a stay of execution pending appeal is to aid the appellate process by making it more effective and avoiding the unnecessary waste of time, costs, and resources. In **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2021] JMCA App 19 at para. [76], I observed:

“The underlying rationale for a stay pending appeal is that it would aid the appellate process and make it more effective. It would ensure, as far as possible, that if the appealing party, is ultimately, successful in its challenge, it will not be denied the full benefit of its success (see **R (H) v Ashworth Special Hospital Authority** [2002] EWCA Civ 923, (albeit, that the primary principles were stated in the context of judicial review proceedings). So, the whole aim was to prevent the appeal being rendered nugatory as well as to avoid an unnecessary waste of time, costs and resources. This would be the result if the hearing below were to proceed to completion and was then adjudged to be a nullity for want of jurisdiction.”

[18] Mr Graham has not provided any evidence by affidavit to demonstrate any prejudice or injustice that will be visited on him if a stay of execution is refused, outside of that which is inherent in depriving him, as a judgment creditor, of the fruits of his judgment in the court below. The applicants have contended that the appeal will be rendered nugatory if a stay of execution is not granted. I accept this contention.

[19] The orders by the learned judge, which are the subject of the appeal, set into motion a sequence of events that contemplate the forensic audit being commenced and

completed, and Mr Graham receiving a payout of any profits due to him, within a reasonably short time. The relevant orders require the audit to be completed “as soon as is reasonably practicable and, in any event, no later than six (6) months” of receiving instructions from the parties (para. 10 of the learned judge’s order); that the applicants should pay any profits due to Mr Graham within two months of being notified of any profits by the auditor (para. 12 of the learned judge’s order); and that the costs of the audit are to be borne by the applicants (para. 10 of the learned judge’s order).

[20] Given the timeline set in motion by the learned judge’s orders and the current stage at which the appeal stands in its procedural lifespan, it is likely that, if a stay is not granted, the forensic audit may be underway and possibly completed before the appeal can be heard and determined. There is, therefore, a risk that the appeal would be rendered academic and accordingly otiose if a stay is not granted.

[21] There is also the possibility that the forensic audit could be underway or even completed at the time the appeal is determined. In that event, the auditor would have to be paid by the applicants, regardless of the outcome of the appeal, and any costs incurred due to the engagement of the auditor will have been wasted if the applicants are successful in their appeal. It is therefore in keeping with the interests of justice, including avoiding unnecessary costs, that a stay be granted.

[22] In the circumstances, I am of the view that the risk of injustice to the applicants if a stay is not granted, outweighs any injustice that would be visited on Mr Graham in that event. Accordingly, the balance of injustice favours the grant of a stay of execution pending the determination of the appeal.

C. Disposal of the application for a stay

[23] Having found that the appeal is arguable with some merit, and that the balance of injustice favours the grant of a stay of execution of the learned judge’s orders, I am satisfied that granting a stay best accords with the interests of justice. Therefore, the applicants have met the threshold requirements for obtaining a stay of execution.



## **Conclusion**

[24] For all the foregoing reasons, I make the following orders:

1. Supreme Court Civil Appeal No COA2025CV00033 is consolidated with Supreme Court Civil Appeal No COA2025CV00034 as of the date hereof and shall proceed in accordance with the Court of Appeal Rules 2002 and be heard together as a consolidated appeal.
2. Orders 6 – 12 and 21 of the judgment of Jackson-Haisley J, dated 26 March 2025, are stayed pending the determination of the consolidated appeal or until further order.
3. Costs of the application are costs in the appeal.
4. Applicants' attorneys-at-law are to prepare file and serve this order.